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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HENRY J. KIRKSEY, *et al.*,
Appellants,

v.

STATE OF MISSISSIPPI

and

UNITED STATES OF AMERICA,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. After a Section 5, Voting Rights Act, declaratory judgment action has been filed in District Court seeking judicial preclearance of a state legislative reapportionment plan, does the Attorney General, who is a litigant in that action, have the authority unilaterally to grant Section 5 preclearance of that reapportionment plan over the objections of adversely affected black applicants for intervention, thus rendering the lawsuit moot and denying those black voters an opportunity to present evidence in District Court that the plan is racially discriminatory in purpose and effect?

2. May black voters who allege and show that they are adversely affected by a new state legislative reapportionment plan be denied intervention under Rule 24(a) and (b) in a Section 5 declaratory judgment action seeking judicial preclearance of the new plan, when disposition of the action would as a practical matter impair their ability to protect their interest in a nondiscriminatory state legislative reapportionment plan and their interests are not adequately represented by the existing parties?

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JURISDICTIONAL STATEMENT

Appellants, twenty-five black voters of the State of Mississippi,[1] appeal from the final judgment of the United

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[1] Appellants are state Senator Henry J. Kirksey, a black member of the Mississippi Senate and registered voter in Hinds County, Mississippi, Owen H. Brooks, a black resident and registered voter of Washington County, Mississippi, Carroll Rhodes, a black resident and registered voter of Copiah County, Mississippi, Representative Tyrone Ellis, a black member of the Mississippi House of Representatives and registered voter of Oktibbeha County, Mississippi, Evan Doss, Jr., tax assessor and a black registered voter of Claiborne County, Mississippi, Henry Boyd, Jr., a black resident and registered voter of Marshall County, Mississippi, June Johnson, a black resident and registered voter of Leflore County, Mississippi, Abraham Gates, a black resident and registered voter of Humphreys County, Mississippi, Eugene Fouche, a black resident and

States District Court for the District of Columbia (three-judge court) dismissing a declaratory judgment action filed by the State of Mississippi seeking preclearance of its 1982 legislative redistricting plan under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The District Court based its decision to dismiss on the fact that the United States Attorney General administratively precleared the 1982 Mississippi legislative redistricting plan, even though that preclearance action occurred after the declaratory judgment action was filed in District Court. In light of its view that the case should be dismissed, the District Court also denied the timely motion of appellants to intervene. Appellants contend that once a Section 5 declaratory judgment action is filed in the United States District Court for the District of Columbia, the

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registered voter of Yazoo County, Mississippi, Mayor Robert Gray, Mayor of Shelby, Mississippi and a black registered voter of Bolivar County, Mississippi, Mayor Johnny B. Thomas, Mayor of Glendora, Mississippi and a black registered voter of Tallahatchie County, Mississippi, Supervisor Bennie Thompson, a black member of the Board of Supervisors and registered voter of Hinds County, Mississippi, Harry Bowie, a black resident and registered voter of Pike County, Mississippi, John W. Jackson, a black resident and registered voter of Clay County, Mississippi, Councilman Joe Edwards, a city councilman of Columbus, Mississippi and black registered voter of Lowndes County, Mississippi, Edward Blackmon, a black resident and registered voter of Madison County, Mississippi, Mrs. Jesse D. Banks, a black resident and registered voter of Holmes County, Mississippi, Robert Jackson, a black resident and registered voter of Quitman County, Mississippi, Charles McLaurin, a black resident and registered voter of Sunflower County, Mississippi, state Representative David Green, a black member of the Mississippi House of Representatives and registered voter of Amite County, Mississippi, state Representative Barney Schoby, a black member of the Mississippi House of Representatives and registered voter of Adams County, Mississippi, Denise Walls, a black resident and registered voter of Coahoma County, Mississippi, Robert M. Walker, a black resident and registered voter of Warren County, Mississippi, Mrs. Emma Harris, a black resident and registered voter of Sharkey County, Mississippi, and Mrs. Reecy L. Dixon, a black resident and registered voter of Noxibee County, Mississippi.

Attorney General has no preclearance authority over that submitted plan, and the District Court becomes the sole arbiter of the Section 5 issues before the Court. Therefore, the District Court's dismissal erroneously resulted from an invalid action of the Attorney General and should be reversed. The District Court's denial of appellants' motion to intervene also should be reversed.

OPINION BELOW

The opinion and order of the three-judge District Court for the District of Columbia is unreported and is set out in Appendix A.

JURISDICTION

The judgment of the three-judge District Court was entered on January 12, 1983. Appellants filed a timely notice of appeal within 60 days of the entry of the final judgment, 28 U.S.C. § 2101(b), on March 10, 1983, and the notice of appeal is set out in Appendix B. Upon the filing of an application for an extension of time within which to docket this appeal, the Chief Justice on April 12 extended the time for docketing this appeal to May 12, 1983. The jurisdiction of this Court is invoked pursuant to 42 U.S.C. § 1973c. This Court has jurisdiction of this appeal. *NAACP* v. *New York*, 413 U.S. 345, 353-56 (1973); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

STATUTORY PROVISION AND FEDERAL RULE INVOLVED

42 U.S.C. § 1973c; Rule 24, Fed. R. Civ. P. (included verbatim in Appendix C).

STATEMENT OF THE CASE

The State of Mississippi filed this action on September 20, 1982 seeking a declaratory judgment, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C.

§ 1973c, that its 1982 state legislative reapportionment plan (S.B. 2430, 1982 Miss. Laws ch. 305, and H.B. 315, 1982 Miss. Laws ch. 306 (hereinafter S.B. 2430 and H.B. 315)) does not have a racially discriminatory purpose or effect. The plan substantially changes the boundaries of Mississippi's 122 House districts and 52 Senate districts. The United States Department of Justice, representing the defendant United States, filed its answer on November 1, 1982, and on November 18, 1982, appellants filed a motion for leave to intervene and proposed answer to oppose District Court approval of Mississippi's reapportionment plan.

Prior to filing this action, Mississippi submitted S.B. 2430 and H.B. 315 to the Attorney General for administrative preclearance under Section 5. By letter dated August 25, 1982, the Attorney General responded with a request that the state supply additional information. Mississippi then filed this lawsuit.

Appellants alleged in support of their intervention pursuant to Rule 24(a), Fed. R. Civ. P., that they were adversely affected by Mississippi's 1982 legislative reapportionment plan. They alleged that the plan has both the purpose and effect of denying and abridging their right to vote on account of race, that they were so situated that the disposition of this action would as a practical matter impair or impede their right to vote free of racial discrimination protected by Section 5 of the Voting Rights Act, that appellants' interests as black citizens and black voters and as representatives of the class of black citizens and black voters were not adequately protected by the existing parties, and that their participation was necessary to ensure a proper adversarial proceeding in this action. Motion to Intervene, pp. 1-3. Alternatively, appellants alleged pursuant to Rule 24(b), Fed. R. Civ. P., that they had defenses to plaintiff's claims presenting both questions of law and fact which are common to this action. *Id.*, p. 3.

On November 22, 1982, the Department of Justice notified Mississippi that the Attorney General would not interpose a Section 5 objection to the 1982 legislative reapportionment plan. Mississippi and the Justice Department then filed, on December 2, 1982, a joint motion to dismiss this action, claiming the action was moot in light of the Attorney General's purported administrative preclearance of the plan. Mississippi and the Justice Department also filed memoranda opposing appellants' motion to intervene.

In support of their motion to intervene and in opposition to the joint motion to dismiss filed by the plaintiff and the Department of Justice, appellants submitted an affidavit analyzing the discriminatory and retrogressive effect of the plan which showed that the new plan reduces the number of districts which are 65 percent and over black in voting age population from 14 to 9, and reduces the number of districts which are 60 percent black and over in voting age population from 19 to 16.[2] Appellants

[2] Applicants-Intervenors' Memorandum of Points and Authorities in Opposition to the Motion to Dismiss and Reply to the Justice Department's Opposition to the Motion to Intervene, Affidavit of Robert B. McDuff, p. 2. The District Court for the District of Columbia previously has found, and Mississippi has recently stipulated, that because of a past history of racial discrimination, lower black voter registration and turnout, and racial bloc voting, election districts in Mississippi generally must be at least 65 percent black in population or 60 percent black in voting age population to provide black voters with an opportunity to elect candidates of their choice. *Mississippi* v. *United States*, 490 F. Supp. 569, 575 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980); *Mississippi* v. *Smith*, 541 F. Supp. 1329 (D.D.C. 1982), First set of Stipulations, filed April 30, 1982, Stipulation No. 16. Accord: *Donnell* v. *United States*, Civil No. 78-0392 (D.D.C. July 31, 1979) (Finding No. 37), *aff'd mem.*, 444 U.S. 1059 (1980) (Warren County, Mississippi). An analysis of the 1979 state legislative elections shows that in the Mississippi House of Representatives, no black candidate, except one, was elected from a state House district with a black voting age population under 60 percent, and no black candidate was elected from any district in the Delta area with a black voting age population under

also filed memoranda opposing the joint motion to dismiss contending that Section 5 of the Voting Rights Act vests the District Court with the primary role of protecting the rights of black voters to be free of discriminatory voting law changes once its jurisdiction is invoked by a state in a Section 5 declaratory judgment action, and that the action should not be dismissed without according appellants an opportunity to be heard.

The District Court on January 12, 1983 without a hearing granted the motion to dismiss and denied appellants' motion to intervene. In its brief two-page opinion the Court held:

> The Attorney General's action in preclearing the plan has removed the controversy between the parties and rendered moot the State's suit for a declaratory judgment. Section 5 provides for either administrative *or* judicial review, not both. Moreover, private parties may not obtain judicial review of the Attorney General's Section 5 decision, but may challenge a proposed electoral change in traditional constitutional litigation. *Morris* v. *Gressette*, 432 U.S. 491, 506-07 (1977).

Appendix A, *infra*, p. 2a.

THE QUESTIONS ARE SUBSTANTIAL

This appeal raises the important issue of the respective Section 5 preclearance powers of the United States District Court for the District of Columbia and the United States Attorney General once a Section 5 declaratory judgment action has been filed in the District Court. The Court below assumed without much discussion that the Attorney General as a litigant in a Section 5 declaratory judgment action may unilaterally cause the dismissal of the lawsuit and preclude further District Court review

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65.91 percent. McDuff Affidavit, pp. 1-2. This analysis also shows that for the Mississippi Senate, no black candidate was elected from a district with a black voting age population under 69 percent. *Id.*

simply by agreeing to a redistricting plan and calling that agreement "preclearance."

However, this Court held in *City of Port Arthur* v. *United States*, 103 S.Ct. 530 (1982), that the Attorney General's approval of a covered jurisdiction's redistricting plan, presented to the District Court in a joint submission, does not dictate the District Court's action and does not require that the District Court preclear the plan. The question here is whether the Attorney General can accomplish through the back door what cannot be done through the front—whether he can merely call his agreement to the plan "preclearance" rather than making a joint submission or presenting a proposed consent decree to the District Court, and thereby steer clear of the already-filed lawsuit, unilaterally causing the court action to be dismissed without independent District Court review.

This is an issue capable of recurrence, particularly as a number of local governments are now seeking preclearance of redistricting plans drawn in response to the 1980 Census. The scope of the District Court's authority must be established for those instances in which the Attorney General, after a Section 5 action has been filed before the District Court, agrees to the redistricting plan of a covered jurisdiction. *City of Port Arthur* states that the District Court has primary preclearance authority, and that ruling should control situations such as the present case where the Attorney General terms his agreement a "preclearance" and seeks to skirt the purview of the District Court.

This case is not precluded by *Morris* v. *Gressette*, 432 U.S. 491 (1977). In *Morris*, this Court held that the correctness of a Section 5 preclearance decision by the Attorney General is not subject to judicial review in a subsequently-filed lawsuit. Here, however, appellants do not raise the issue of whether the Attorney General was right or wrong on the merits of his preclearance decision. They

argue instead that the Attorney General *had no authority* to preclear the voting change once a Section 5 declaratory judgment lawsuit had been filed, and that preclearance lay solely within the province of the District Court.

This appeal also presents the important question, which also is subject to recurrence, whether black voters in a state covered by Section 5, who are the intended beneficiaries of the Section 5 preclearance procedure, have a right to intervene in a Section 5 judicial proceeding to prevent their right to a nondiscriminatory and nonretrogressive legislative reapportionment plan from being prejudiced or bargained away by agreement between the submitting jurisdiction and the Department of Justice.

I. THE DISTRICT COURT'S DECISION CONTRAVENES THIS COURT'S DECISION IN *CITY OF PORT ARTHUR* v. *UNITED STATES* AND OTHER DECISIONS OF THIS COURT AND SUBVERTS THE PURPOSE OF THE VOTINGS RIGHTS ACT TO ACCORD JUDICIAL AUTONOMY IN JUDICIAL PRECLEARANCE PROCEEDINGS.

This Court in *City of Port Arthur* v. *United States*, 103 S.Ct. 530 (1982), ruled that the Attorney General may not dictate the Section 5 propriety of a city's redistricting plan simply by agreeing to the plan and joining the city in submitting it to the District Court. The Attorney General may not get around the *Port Arthur* ruling and dictate the District Court's decision in the present case simply by calling his agreement to the plan "preclearance" rather than making a joint submission to the District Court.

In the *Port Arthur* case, after the District Court had held that the municipal expansions required the City to adopt a representation plan which reflected black potential political strength in the enlarged community, the Attorney General approved a new 4-2-3 representation plan. The City and the Attorney General jointly submitted this

plan to the District Court for approval. The intervenors, black voters of Port Arthur, objected to this new representation scheme. The District Court refused to be bound by the Attorney General's approval and rejected the plan because it failed fully to neutralize the adverse impact resulting from the city expansions. The court ruled that if the plan were modified to eliminate the majority vote requirement for the two at-large council seats, it would approve the plan. 103 S.Ct. at 533-34.

This Court affirmed on appeal. The Court expressly repudiated the City's argument that the Attorney Generals' assent to the new representation scheme required the District Court to approve it:

> The City argues that the District Court was required to approve a plan jointly submitted by the City and the Attorney General. The Voting Rights Act, however, assigns primary responsibility to the District Court to determine whether a change in voting procedures violates § 5. Preclearance by the Attorney General may obviate a court suit, but here the Attorney General was acting in the capacity of a litigant when it joined the City in submitting a plan for the court's consideration. In that posture, neither the Attorney General, the City, nor both of them together could dictate the court's conclusion as to the acceptability of the plan under § 5.

103 S.Ct. at 534 n.5.

This Court's ruling that the Voting Rights Act "assigns primary responsibility to the District Court to determine whether a change in voting procedures violates § 5" should control the present case, where the Attorney General called his agreement to Mississippi's reapportionment plan "preclearance" rather than presenting it to the District Court in the form of a joint motion for approval. Form would be exalted over substance if the Attorney General were able to achieve an entirely different result and to dictate the District Court's decision by taking the techni-

cal step of writing a letter of no-objection to the submitting jurisdiction and calling his agreement to the plan "preclearance." Although appellants directed the District Court's attention to the *Port Arthur* decision immediately after it was handed down, the District Court did not discuss the *Port Arthur* decision in dismissing this case nor attempt to distinguish it in any way.[3]

Similarly, in *City of Richmond* v. *United States*, 422 U.S. 358 (1975), during the pendency of Richmond's Section 5 preclearance action for approval of its annexation but prior to trial, the City of Richmond adopted and the Attorney General approved, with minor modifications, a new nine-ward voting plan to replace its at-large election system. 422 U.S. at 366. The City and the Attorney General submitted this new ward voting plan to the District Court in the form of consent judgment. *Id.* The intervenors opposed the new plan, and the District Court referred the case to trial before a special master. *Id.* After receiving the special master's findings, the District Court rejected approval of the ward plan as failing fully to neutralize the adverse effect of the annexations. *Id.* at 367.

On appeal, the City argued that the Attorney General's approval of the new ward plan should have been given "deference" by the District Court because the Attorney General under Section 5 of the Voting Rights Act "is given equal responsibility with the District Court for

[3] The inconsistency between what happened here and this Court's ruling in *Port Arthur* cannot be explained by this Court's observation that "[p]reclearance by the Attorney General may obviate a court suit . . ." 103 S.Ct. at 534 n.5. That statement obviously refers to the normal situation in which a covered jurisdiction submits an election law change to the Attorney General for administrative preclearance and does not file a Section 5 lawsuit until a final administrative ruling has been obtained. If the Attorney General preclears the change, a court suit is unnecessary. In any event, the Court said that administrative preclearance "*may* obviate a court suit," not that it *necessarily would* obviate a court suit.

an initial decision upon voting changes." Reply Brief for Appellant, p. 5; also Brief for the Appellant, pp. 62-63. This Court did not accept the Attorney General's approval as binding, but instead reviewed the case solely on its merits. The Court thereby implicitly rejected the City's argument that the District Court was in any way bound by the Attorney General's approval of the new ward plan or that this approval in any way constituted Section 5 preclearance of the new plan.

The District Court's ruling here that the Attorney General's approval of Mississippi's legislative reapportionment plan "removed the controversy between the parties and rendered moot the State's suit for a declaratory judgment" therefore is fundamentally inconsistent with this Court's rulings in *Port Arthur* and *City of Richmond*. In both cases, after declaratory judgment actions had commenced, the Attorney General approved new election law changes, but in both cases both the District Court and this Court rejected the cities' contentions that the Attorney General's approval rendered the controversy moot and dictated the acceptability of the changes under Section 5 standards.[4]

Allowing the Attorney General unilaterally to preempt the jurisdiction of the District Court subverts the purpose of the Voting Rights Act to accord "primary responsibility" and judicial autonomy to the District Court once its jurisdiction has been invoked by a cov-

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[4] In one prior case, *Senate of State of California* v. *United States*, Civil No. 81-2767 (D.D.C. filed Nov. 17, 1982), the Attorney General declined Section 5 review of a state legislative reapportionment plan submitted to him after a Section 5 declaratory judgment action had been filed. Letter from William Bradford Reynolds, Assistant Attorney General, to William N. Durley, Feb. 19, 1982. This action contradicts the Justice Department's position, taken here, that it has continuing jurisdiction to review the same reapportionment plan which is the subject of a Section 5 declaratory judgment action.

ered jurisdiction.[5] It would give free rein to covered states and localities to play the administrative jurisdiction of the Attorney General off against the judicial jurisdiction of the District Court in sporadic fashion to subvert the salutary purposes of the Section 5 preclearance process. A state or locality could submit a voting law change first to the Attorney General, then to the District Court, then back to the Attorney General, playing one off against the other until it obtained a resolution from one source or the other to its liking, without regard for the orderly processes of law. The voting rights of minority citizens, which the Act was passed to protect, would get lost in the shuffle, as they have here.[6]

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[5] A Section 5 declaratory judgment action is not a judicial review of an agency determination, but rather is an independent judicial proceeding requiring *de novo* review of the covered election law change. *Morris* v. *Grissette, supra,* 432 U.S. at 505 n.21. As such, it cannot be rendered moot by action of the administrative agency, here, the Department of Justice. Cf. *Consolidated Express, Inc.* v. *New York Shipping Association, Inc.,* 602 F.2d 494, 525 (3d Cir. 1979); *Nader* v. *Volpe,* 475 F.2d 916 (D.C. Cir. 1973); *United States* v. *Open Bulk Carrier, Ltd.,* 465 F. Supp. 159 (S.D. Ga. 1979).

[6] If the District Court's order is sustained, the Attorney General also theoretically would have the authority to circumvent a decision of this Court. Under the Justice Department's Section 5 regulations, the Attorney General has the power to withdraw a Section 5 objection at any time. *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965,* 28 C.F.R. §§ 51.44-51.47 (Jan. 5, 1981). Thus, without resort to the judicial process, the Attorney General would possess the authority to withdraw a Section 5 objection even after the District Court in a Section 5 declaratory judgment action had refused to approve a submitted plan and this Court had affirmed. Cf. *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess., Vol. 1, 680-82, 699-703 (1982) (testimony of state Sen. Henry J. Kirksey and exhibits) (1976 objection to municipal annexation in Jackson, Mississippi, withdrawn five years later after intervention by members of Mississippi's congressional delegation).

This has already happened in *City of Port Arthur* v. *United States, supra.* After this Court's decision affirming the District

The principle that the Voting Rights Act assigns "primary responsibility" for Section 5 preclearance to the District Court is implicit in the legislative history of the Act. The original version of Section 5 initially considered by Congress in 1965 provided for preclearance only through the District Court. *Morris* v. *Gressette, supra*, 432 U.S. at 503. In response to concerns expressed by some Senators that the covered states would be under a heavy burden to file a lawsuit in the District of Columbia every time a voting change was contemplated, Attorney General Katzenbach stated that many of the voting changes would be noncontroversial and suggested a procedure by which the United States Attorney General could approve those changes without the necessity of a court suit. *Hearings on S. 1564 Before the Senate Committee on the Judiciary*, 89th Cong., 1st Sess., pt. 1, at 237 (1965) (Attorney General Katzenbach, responding to questions from Senator Ervin of North Carolina). That suggestion was later implemented, and Section 5 as enacted contained the alternative of preclearance through the Attorney General.

The administrative preclearance procedure by way of the Attorney General was thus intended by Congress as "an expeditious alternative to declaratory judgment actions," *Morris* v. *Gressette, supra*, 432 U.S. at 504, and was not intended to circumvent the jurisdiction of the

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Court's decision, the Attorney General on March 21, 1983, without first seeking leave of the District Court, withdrew his objection to the municipal consolidations and annexation at issue in that case, thus preclearing, for Section 5 purposes, the disputed voting law changes. Although the Attorney General's action in that case met the conditions established by the District Court for Section 5 preclearance, this assertion of power to preclear changes which are the subject of judicial proceedings would allow the Attorney General to overturn decisions of this Court with which he disagreed simply by sending the submitting jurisdiction a Section 5 letter of no-objection.

District Court once a declaratory judgment action has been filed.[7]

This interpretation is not disadvantageous to covered jurisdictions in any way because the District Court's authority over preclearance can only be invoked by a covered jurisdiction through the filing of a Section 5 declaratory judgment action. If the covered jurisdiction prefers first to seek administrative preclearance from the Attorney General without a declaratory judgment proceeding, it is free to do so. But once the covered jurisdiction affirmatively chooses to place the issue of whether its voting law change is racially discriminatory before the District Court, that court should become the sole ar-

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[7] This interpretation is supported by the text of Section 5 itself. Section 5 provides that whenever any covered state or political subdivision enacts or seeks to administer a covered voting law change,

> such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such [voting law change] does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color [or language minority status], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such [voting law change]:

42 U.S.C. § 1973c. Section 5 then provides:

> *Provided*, that such [voting law change] may be enforced *without such proceeding* if the [voting law change] has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . .

Id. (emphasis added). The text of the statute itself demonstrates two major points. First, it demonstrates the primacy of the declaratory judgment action in the District Court. Second, it allows preclearance by the Attorney General only "without such proceeding," that is, in the absence of a declaratory judgment proceeding. The text of the statute itself thus supports the interpretation that Congress intended that once a Section 5 declaratory judgment proceeding was commenced by a covered jurisdiction, the Attorney General no longer has the authority to preclear a covered voting law change.

biter of whether or not the change violates Section 5. This interpretation also furthers the legislative purpose of the Voting Rights Act of protecting minority citizens' right to vote and to participate in the political processes without discrimination. In the declaratory judgment proceeding, minority voters generally have the opportunity to intervene and participate as an equal litigant, thus giving them an equal voice to prevent the dissipation of their voting rights at the hands of the other litigants in the judicial proceeding.

For these reasons, the District Court erred in ruling that the Attorney General's action in approving Mississippi's legislative reapportionment plan rendered Mississippi's lawsuit for a Section 5 declaratory judgment moot.

II. THE DISTRICT COURT ERRED IN DENYING INTERVENTION TO APPELLANTS IN THIS ACTION.

This Court should review the District Court's decision to deny intervention to appellants because it presents a substantial question subject to recurrence and because this case presents a conflict of authority in the District Court for the District of Columbia on whether minority voters have a right to intervene in Section 5 preclearance actions. In the Georgia congressional redistricting case, *Busbee* v. *Smith*, 549 F. Supp. 414 (D.D.C. 1982) (three-judge court), *aff'd mem.*, 51 U.S.L.W. 3553 (U.S. January 25, 1983), the District Court allowed minority voters to intervene as of right pursuant to Rule 24(a). *Busbee v. Smith*, Order of March 22, 1982.[8]

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[8] The District Court for the District of Columbia normally grants intervention to minority voters in Section 5 declaratory judgment actions. See *City of Port Arthur* v. *United States*, 517 F. Supp. 987 (D.D.C. 1981), *aff'd*, 103 S.Ct. 540 (1982) (intervention allowed to black voters who provided sole opposition to the redistricting plan jointly submitted to the District Court by the Attorney General and the City); *City of Richmond* v. *United*

Rule 24 should be liberally construed to do substantial justice. *Washington State Building and Construction Trades Council, AFL-CIO* v. *Spellman*, 684 F.2d 627, 630 (9th Cir. 1982); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1904 (1972). Rule 24(a)(2) confers a right to intervene upon a timely application when the applicant for intervention (1) claims an interest relating to the property or transaction which is the subject of the action, (2) is so situated that the disposition of the action may "as a practical matter" impair or impede his ability to protect that interest, and (3) shows that movant's interest is not adequately represented by the existing parties. Appellants satisfied all these conditions for intervention of right.

First, they showed that they had a "significantly protectable interest" (*Donaldson* v. *United States*, 400 U.S. 517, 531 (1971)) in a state legislative reapportionment plan which meets Section 5 standards. Section 5 was en-

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States, 375 F. Supp. 1344, 1349 n.23 (D.D.C. 1974), *vac'd and remanded on other grounds*, 422 U.S. 358 (1975) (intervention allowed to individual and black organization as representatives of black community; intervenors provided sole opposition to the proposed electoral change once the Justice Department agreed to the City's districting plan); *Mississippi* v. *Smith*, 541 F. Supp. 1329 (D.D.C. 1982), *appeal dism'd*, 51 U.S.L.W. 3789 (U.S. May 2, 1983) (Mississippi congressional redistricting plan, intervention allowed to black Mississippi voters); *Mississippi* v. *United States*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980) (Mississippi legislative reapportionment plan, intervention allowed to black Mississippi voters); *Donnell* v. *United States*, Civil No. 78-0392 (D.D.C. July 31, 1979), *aff'd mem.*, 444 U.S. 1059 (1980) (Mississippi county redistricting plan, black voters); *Beer* v. *United States*, 374 F. Supp. 357, 359 n.10 (D.D.C. 1974) and 374 F. Supp. 363, 367 n.5 (D.D.C. 1974), *vac'd on other grounds*, 425 U.S. 130 (1976) (intervention allowed to five black citizens registered to vote in New Orleans elections); *City of Petersburg, Virginia* v. *United States*, 354 F. Supp. 1021, 1024 (D.D.C. 1972) *aff'd mem.*, 412 U.S. 934 (1973) (court entered orders allowing black citizens leave to intervene).

acted to protect minority voters from election law changes which are racially motivated, and, as this Court said in *Beer* v. *United States*, 425 U.S. 130, 141 (1976), from redistricting plans which "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Allen* v. *State Board of Elections*, 393 U.S. 544, 554-57 (1969) (minority voters, as the intended beneficiaries of the Act, have a private right of action to enforce Section 5 preclearance requirements). Appellants therefore had a right to intervene in this lawsuit to protect their voting rights, and the voting rights of black Mississippians generally, from being eroded and diminished by the new state legislative reapportionment plan.

Second, it is clear that appellants are so situated that the final disposition of this action "may as a practical matter impair or impede [their] ability to protect that interest" (Rule 24(a)(2)) in a nondiscriminatory state legislative reapportionment plan which satisfies the requirements of Section 5. The rights appellants are asserting in this action are their Section 5 rights to a legislative reapportionment plan which is not racially discriminatory in purpose or retrogressive in effect. The District Court's denial of intervention and dismissal of this action has a direct impact on appellants' ability to protect their Section 5 rights: It deprives appellants of both the advantageous allocation of burden of proof and procedures of Section 5,[9] and the opportunity to challenge

[9] Section 5 was enacted to "shift the advantage of time and inertia" from covered jurisdictions to minority voters. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966). Accordingly, a covered election law change cannot be implemented unless and until Section 5 preclearance has been obtained, the submitting jurisdiction has the burden of proving that an election law change is not discriminatory in purpose or effect, and venue in Section 5 cases is limited to the District Court for the District of Columbia, with a direct appeal to this Court. *Id.* In constitutional litigation, on the other hand, a change may be implemented until minority

the contested plan as violative of the Section 5 "effect" standard as applied by this Court in *Beer* v. *United States, supra.*[10]

The District Court erred when it apparently held that appellants would not be prejudiced by the dismissal because they "may challenge a proposed electorial change in traditional constitutional litigation" (App. A, p. 2a). This justification for denying intervention is erroneous because it misconstrues the interest asserted in this case. See 3B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 24.07[3], p. 24-63 (2d ed. 1982) ("The question as to the practical effect on the interest of the applicant cannot properly be answered until the interest of the applicant is first analyzed and determined.") (footnote omitted). By the dismissal of this action, appellants lose all of their Section 5 claims.

The District Court's decision also is likely to have a substantial adverse impact on any future litigation chal-

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voter plaintiffs obtain a final judgment against it, minority voters have the burden of proving discriminatory purpose, and, in this case, venue would be the Mississippi District Court.

[10] The *Beer* retrogression standard was formulated in the context of Section 5 litigation, and it is not determinative either in constitutional litigation or in litigation under the 1982 amendment to Secton 2 of the Voting Rights Act (96 Stat. 131). In constitutional litigation, discriminatory effect is only one factor which the courts may consider: "disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose." *City of Mobile* v. *Bolden*, 446 U.S. 55, 70 (1980) (plurality opinion). Similarly, in litigation under the 1982 amendment to Section 2, discriminatory effect is only one factor to be considered. S. Rep. No. 97-417, 97th Cong., 2d Sess. 27-30 (1982); also, 128 Cong. Rec. S7095 (remarks of Sen. Kennedy) (daily ed. June 18, 1982); *id.* at H3841 (remarks of Rep. Sensenbrenner) (daily ed. June 23, 1982) ("the retrogression requirement of Beer against United States does not apply to Section 2 cases—although of course such a retrogression would be relevant evidence in a Section 2 case.").

lenging this plan. Under the 1966 revision of Rule 24 (a)(2), applicants for intervention are not required to show that the District Court's decision would have a *res judicata* effect. Advisory Committee Note on 1966 Amendment, 28 U.S.C.A., Rule 24, p. 17; 3B J. MOORE, *supra*, p. 24-63. It is sufficient that the disposition of the action may have a practical adverse or prejudicial impact on any future assertion of movant's claims. *Atlantis Development Corp.* v. *United States*, 379 F.2d 818, 826-29 (5th Cir. 1967); 3B J. MOORE, *supra*, pp. 24-64 to 24-65. As a practical matter, Section 5 preclearance is extremely prejudicial to any future lawsuit challenging a Section 5-approved redistricting plan. Appellants would not only have a heavier burden of proof, but they also would have an extremely difficult time overcoming the presumption accorded to Section 5 preclearance. See, e.g., *Perkins* v. *Matthews*, 400 U.S. 379, 390-91 (1971) (Attorney General's interpretations of Section 5 entitled to "great deference"). To our knowledge, no such actions have been successful.

Third, the fact that the Justice Department approved Mississippi's plan over the objections of appellants makes it crystal clear that the interests and positions of the Justice Department and appellants are diametrically opposed to one another, and that there is no party to this litigation who adequately represents the interests and concerns of the appellants. A number of cases brought before this Court have demonstrated that the Justice Department and minority intervenors frequently have adverse interests and have taken divergent positions on whether a particular change meets Section 5 standards, e.g., *City of Lockhart* v. *United States*, 51 U.S.L.W. 4189 (U.S. February 23, 1983); *City of Port Arthur* v. *United States*, *supra*; *City of Richmond* v. *United States*, *supra*, and this Court has sustained the position of intervenors, e.g., *City of Port Arthur* v. *United States*.

In the District Court pleadings, appellants alleged that this plan was enacted for a racially discriminatory purpose and presented incontrovertible statistical evidence that "the ability of minority groups to participate in the political process and to elect their choices to office is . . . *diminished*" (*Beer*, *supra*, 425 U.S. at 141) (*supra*, p. 5, n. 2). The practical effect of the District Court's summary dismissal of this action, without a hearing, is to deny black voters of Mississippi an opportunity to be heard in District Court on their proof that the plan fails to meet Section 5 standards. Appellants' claim to intervention is strengthened by the fact that they are seeking to secure the public rights of the black voters of Mississippi and to vindicate a policy that Congress considers of the highest priority.

> [W]here the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.

Missouri-Kansas Pipe Line Co. v. *United States*, 321 U.S. 502, 506 (1941).

Alternatively, if this Court determines that intervention of right under Rule 24(a) was properly denied, then this Court should hold that the District Court abused its discretion in denying permissive intervention under Rule 24(b) because appellants had claims and proof bearing directly on the issue of whether the plan meets Section 5 standards. 3B J. MOORE, *supra*, ¶ 24.10.

For these reasons, the District Court's order denying appellants' motion to intervene should be reversed.

CONCLUSION

For the above-stated reasons, and on the basis of the authorities cited, this Court should note probable jurisdiction, reverse the judgment of the District Court dismissing this action as moot and denying intervention by appellants, and remand this case back to the District Court with instructions to conduct an independent review to determine whether S.B. 2430 and H.B. 315 meet Section 5 standards.

Respectfully submitted,

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May 12, 1983

APPENDIX A

District Court Decision and Final Judgment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2673

STATE OF MISSISSIPPI,

v. *Plaintiff,*

UNITED STATES OF AMERICA,

Defendant.

[Filed Jan. 12, 1983]

MEMORANDUM AND ORDER

This matter is before the court on the motion to intervene of a group of black registered voters from Mississippi (the "Applicants") and on plaintiff's and defendant's joint motion to dismiss. The State of Mississippi brought this action seeking a declaratory judgment that its 1982 reapportionment of state legislative districts was valid under the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The State brought suit when the Department of Justice ("DOJ") failed to grant the State's earlier application for Section 5 preclearance of the plan, but instead requested more information. In the early stages of this litigation the State furnished the requested information to DOJ, the administrative review continued, and the Attorney General precleared the plan on November 22, 1982. On December 2, 1982, the State and DOJ filed a joint motion to dismiss the case as moot, citing the Attorney General's preclearance.

Meanwhile, on November 18, 1982, the Applicants filed a motion to intervene in this action to challenge the legality of the reapportionment plan. Applicants have opposed the joint motion to dismiss.

Section 5 of the Voting Rights Act provides that a proposed reapportionment in a covered jurisdiction may be precleared either by a declaratory judgment by this court that the proposed change is free from any racially discriminatory purpose or effect, or through submission of the plan to the Attorney General and the Attorney General's failure to interpose any objection thereto within 60 days. 42 U.S.C. § 1973c; *Georgia* v. *United States*, 411 U.S. 526, 529 (1973).

The Attorney General's action in preclearing the plan has removed the controversy between the parties and rendered moot the State's suit for a declaratory judgment. Section 5 provides for either administrative *or* judicial review, not both. Moreover private parties may not obtain judicial review of the Attorney General's Section 5 decision, but may challenge a proposed electoral change in traditional constitutional litigation. *Morris* v. *Gressette*, 432 U.S. 491, 506-07 (1977).

Accordingly, it is by the court, this 12th day of January, 1983, hereby

ORDERED that Applicants' motion to intervene shall be, and hereby is, denied; and it is further

ORDERED, ADJUDGED, and DECREED that plaintiff's and defendant's joint motion to dismiss shall be, and hereby is, granted; and it is further

ORDERED that plaintiff's action shall be, and hereby is, dismissed.

/s/ Edward A. Tamm
United States Circuit Judge

/s/ Thomas A. Flannery
United States District Judge

/s/ Harold H. Greene
United States District Judge

APPENDIX B

Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2673

STATE OF MISSISSIPPI,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant,

and

HENRY J. KIRKSEY, *et al.*,
Applicants for Intervention.

[Received Mar. 10, 1983]

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Henry J. Kirksey, et al., applicants for intervention herein, hereby appeal to the Supreme Court of the United States from the final order entered in this action on January 12, 1983, denying applicants' motion to intervene and dismissing this action.

This appeal is taken pursuant to 28 U.S.C. § 1253 our [and] 42 U.S.C. § 1973C.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day mailed, postage prepaid, a copy of the attached Notice of Appeal to the Supreme Court of the United States to the following counsel for the parties.

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This the 9th day of March, 1983.

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APPENDIX C

Statutory Provision and Federal Rule Involved

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the

guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this action. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Pub.L. 89-110, Title I, § 5, Aug. 6, 1965, 79 Stat. 439, redesignated and amended Pub.L. 91-285, §§ 2, 5, June 22, 1970, 84 Stat. 314, 315; Pub.L. 94-73,

Title II, §§ 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 408, 405.

Rule 24, Federal Rules of Civil Procedure, provides:

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the

grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

No. 82-1840

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

HENRY J. KIRKSEY, *et al.*,
Appellants,

v.

STATE OF MISSISSIPPI
and
UNITED STATES OF AMERICA,
Appellees.

On Appeal From The United States District Court For The District Of Columbia

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1840

HENRY J. KIRKSEY, *et al.*,

Appellants,

v.

STATE OF MISSISSIPPI

and

UNITED STATES OF AMERICA,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

---

MOTION TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

On June 30, 1982 the State of Mississippi submitted to the Attorney General of the United States for preclearance under Section 5, S.B. 2430 and H.B. 315, reapportionment plans for the State Senate and House of Representatives. By letter of August 24, 1982, the Attorney General requested that the State provide more information.

The State leadership and counsel determined that if an additional 60 days elapsed before the Attorney General rendered a decision, and if preclearance were then denied, the State would not have enough time to obtain a declaratory judgment before the election filing periods opened. In order to set the litigation in motion, the State

filed a declaratory judgment action on September 20, 1982. Meanwhile, the State supplied additional information to the Attorney General.

On November 18, 1982 the appellants filed a motion to intervene in the suit. While this motion was pending, the Attorney General advised the State on November 22, 1982, that he would interpose no objection to S.B. 2430 and H.B. 315. Insofar as no controversy existed between the parties, the State and the Department of Justice filed a joint motion to dismiss the case as moot. On January 12, 1983, the District Court granted the motion to dismiss and denied appellants' motion to intervene.

THIS APPEAL PRESENTS NO SUBSTANTIAL QUESTION

I. Insofar As The Appellants Lack Standing To Contest The Dismissal Below, This Appeal Must Be Dismissed For Want Of Jurisdiction.

It is well-established that one whose application to intervene is denied may not appeal from any subsequent order in the proceeding. *Brotherhood of Railroad Trainmen* v. *Baltimore and Ohio Railroad Company*, 331 U.S. 519 (1947). This rule flows naturally from the circumstance that a disappointed intervenor is not a party to the action and hence lacks standing to appeal any issue but the denial of intervention. In *Weiser* v. *White*, the Court of Appeals for the Fifth Circuit held that if the appellate court finds either that the claim of right to intervene was without merit or that the request for permissive intervention was denied without an abuse of discretion, the appellate court has no jurisdiction to review the action and the appeal must be dismissed. 505 F.2d 912 (5th Cir. 1974), *cert. denied*, 421 U.S. 993 (1975).

In the present case, the appellants lack standing to argue that the district court erred in dismissing the suit. Absent this essential prerequisite, this Court lacks jurisdiction to review the issue of the dismissal below.

II. The Dismissal Of The Action Below Renders Moot An Appeal From The Order Denying Intervention.

As a general rule, a prerequisite of intervention, which is an ancillary proceeding in an already instituted suit, is an existing suit within the court's jurisdiction. *Noncommissioned Officers' Association of the United States of America* v. *Army Times Publishing Company*, 637 F.2d 372 (5th Cir. 1981). In *Horn* v. *Eltra Corporation*, 686 F.2d 439 (6th Cir. 1982), the E.E.O.C. appealed from the denial of its motion to intervene. During the pendency of the appeal of that motion, the underlying action was dismissed with prejudice pursuant to a settlement between the parties. The Court of Appeals for the Sixth Circuit dismissed the appeal of the intervention motion as moot since no suit remained in which the appellants could intervene.

The court, however, did recognize two exceptions to the general rule that intervention requires a pending suit within the Court's jurisdiction. First, intervenors with an independent basis for jurisdiction may be treated as stating a wholly separate claim, and second, intervenors who become members of a class action may be permitted to proceed with the action even though the claim of the named parties has become moot. *Horn*, 686 F.2d at 440.

In the present case, there is no existing controversy in which Senator Kirksey and the other appellants can intervene, insofar as the action below has been dismissed. Furthermore, neither of the two exceptions apply to this situation. The defendant-intervenors have no independent basis for jurisdiction in an action against the State of Mississippi under Section 5 in the District Court for the District of Columbia.

The Voting Rights Act automatically suspended the operation of voting laws enacted by covered jurisdictions

after November 1, 1964. *South Carolina* v. *Katzenback*, 383 U.S. 301, 335 (1966). Section 5 of the Act permits a state to defeat the automatic suspension by obtaining federal approval of any new enactment. If federal authorities — either a three-judge court in Washington, D.C. or the Attorney General — find that the change does not have the purpose or effect of discriminating against minorities in the exercise of the electoral franchise, the State is free to implement the change. Consequently, "a state or political subdivision wishing to make use of a recent amendment to its voting laws . . . has a concrete and immediate 'controversy' with the Federal Government." *Katzenback*, 383 U.S. at 334. Since the dispute between the State of Mississippi and the United States regarding S.B. 2430 and H.B. 315 has been resolved, neither the appellants nor any private party can independently invoke the unique jurisdiction of the District of Columbia District Court.[1]

The second exception to the principle that a pending lawsuit is a necessary prerequisite to intervention obviously cannot apply in this instance. No class certification has been or could be sought by the parties. Thus, the appellants could not continue, as members of the same class, in the place of a named party.

City of Dallas v. *United States*, 482 F.Supp. 183 (D.D.C. 1980) presented a case similar to the one now before the Court. The city had filed a declaratory judgment action regarding an electoral plan. While the action

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[1] In one of the seminal Supreme Court cases interpreting Section 5, the Court said:

> "Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5." *Allen* v. *State Board of Elections*, 393 U.S. 544, 549 (1969).

was pending, the city council repealed the plan in question and enacted a new electoral scheme. This new plan was submitted to the Attorney General and precleared under Section 5. The City of Dallas then moved to dismiss for mootness.

The intervenors in the declaratory judgment suit opposed dismissal, contending that the court should evaluate the new plan. The court, however, found that it had no jurisdiction to entertain the suit after the controversy between the City and the Federal Government had been settled. While acknowledging the right of the intervenors to file an injunctive or constitutional action in the local federal court, the court stated:

> Nothing in the Act, however, vests this court with jurisdiction to retain a moot case to accommodate the intervenors quest for a forum in which to test a voting plan that has already been approved by the Attorney General under § 1973c *supra*. 482 F.Supp. at 186.

Similarly, in *Commissioners Court of Medina County, Texas* v. *United States*, 683 F.2d 435 (D.C. Cir. 1982), a new redistricting plan was submitted to the Attorney General and precleared, while a declaratory action regarding an earlier plan was pending before a three-judge court. The district court dismissed the suit for mootness. In an appeal of an application for attorney fees in the context of whether an intervenor could be a "prevailing party" in an action which had been dismissed as moot, the Court of Appeals commented:

> Although by the grant of intervention he has become a party, by statute he [the intervenor] is precluded from having any actual impact on the approval or disapproval of what appellees here call a "compromise plan" submitted to the Attorney General in the course of litigation. The Defendant-Intervenor is

> thus powerless to participate in any meaningful way in any "settlement" or "compromise" negotiations.
>
> A Defendant-Intervenor cannot withhold approval of the plan in the hopes of receiving terms more favorable to his interests. 683 F.2d at 440.

This language from *Medina County* and the Court's opinion in *City of Dallas* conclusively demonstrate that an unsuccessful defendant-intervenor in a Section 5 suit cannot appeal from a denial to intervene in a case which has become moot.

The Voting Rights Act deprives covered States of the right to implement their validly enacted legislation which affects voting. From this suspension results a statutorily-created controversy between the State and the Federal Government. Both the parties and the subject matter of the dispute are prescribed by statute. The statutory impediment to implementation of a state law can be overcome either by a declaratory judgment or an administrative preclearance. Either procedure dissolves the conflict. In this instance, the November 22, 1982 objection letter from the Attorney General resolved the dispute between the parties regarding the implementation of S.B. 2430 and H.B. 315. Thereafter no controversy existed over which the district court could exercise jurisdiction and consequently no case existed in which the appellants could intervene.

III. Insofar As The Interests Of The Appellants Are Both Identical With Those Of The Attorney General, And Adequately Represented By Him, The District Court Did Not Abuse Its Discretion In Denying Intervention.

The appellants have argued that they were entitled to intervene as of right in the case below, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. Neither the text of Rule 24(a)(2) nor the case law regarding intervention in Section 5 suits support this contention.

Rule 24(a)(2) provides for intervention as of right when the applicant claims an interest relating to the subject of the litigation and that his ability to protect that interest may be impaired by the disposition of the action. In addition, the applicant must show that his interest is not adequately represented by the existing parties.

The appellants here, as black voters of Mississippi, undoubtedly have an interest in the Section 5 litigation instituted by the State. However, that is the only part of the three-part test prescribed in Rule 24(a)(2) which they can pass.

The appellants claim that preclearance of the State's reapportionment plans will impair their ability to protect their interests. In a subsequent suit instituted by them, they contend, a local federal court would always give deference to the Attorney General's determination. This argument entirely miscontrues the overall structure of the Voting Rights Act. Section 5 sets-up an automatic federal review of all reapportionment legislation so that a potentially discriminating change will be discovered and rejected before it is implemented. This preclearance requirement removes the burden of litigation from private litigants like the appellants and places it on the covered states. This initial determination by the Attorney General or the District of Columbia court, however, is not conclusive on the issue of constitutionality and it is not binding on private parties. The statute itself reserves to private litigants the right to challenge a precleared plan in local federal court.[2] In *Morris* v. *Gressette* this

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[2] "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. 42 U.S.C § 1973c.

Court wrote: "Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation." 432 U.S. 491, 507 (1977). This provision of the statute highlights the absurdity of the appellants' argument that their ability to protect their interests is impaired because preclearance forecloses any opportunity to win a subsequent constitutional challenge.

In *United States* v. *National Bank and Trust Company of Central Pennsylvania*, stockholders of defendant Trust Company moved to intervene as of right in an antitrust suit instituted by the United States, in order to oppose a settlement between the parties. 319 F.Supp 930 (E.D. Pa. 1970). The movants argued that a settlement between the United States and the defendant banks would deprive them of *prima facie* evidence of antitrust violations in their civil treble damages suit. The Court ruled that the movants' interest was unimpaired and adequately protected in the separate action for damages.

Under similar factual circumstances, in *United States* v. *Auto Manufacturers Association*, 307 F.Supp. 617 (C.D. Cal. 1969), *aff'd*, 397 U.S. 248 (1970), the court explained:

> We know of no authority . . . which would require the Government to prosecute this case to judgment solely for the purpose of aiding treble damage claimants. The Government is the designated representative of the public, and sound policy requires that it be free to conduct and control its litigation in the public interest. 307 F.Supp. at 619.

Finally, *United States* v. *Louisiana*, 90 F.R.D. 365 (E.D. La. 1981) was an action brought by the United States challenging, on racial grounds, the operation of the state university system. The potential intervenor was a

black faculty member at one of the predominantly black campuses. She claimed that if intervention were denied her interests would be impaired by *stare decisis* and by the necessity of having to bring another suit. The court denied intervention finding that the movant had no interests which were not susceptible to remedy outside the pending case, should she be dissatisfied with its outcome. Moreover, the court found that there was no real potential for impeding her ability to protect her interests.

In the instant case, the appellants have a statutorily preserved right to institute a second suit. The Attorney General's preclearance has no legally binding effect on them, and no *stare decisis* effect in a *de novo* constitutional action. They cannot claim that denial of their intervention petition inhibits their ability to protect their interests.

Rule 24(a)(2) requires that intervenors as of right show that their interest is not adequately represented by the existing parties. The interests of the appellant in a nondiscriminatory reapportionment is identical with that of the United States. The case against intervention is even stronger where a federal government body or officer is a necessary party, for it is presumed that the United States adequately represents the public interest with which it is entrusted.

In *United States* v. *Board of School Commissioners of the City of Indianapolis*, 466 F.2d 573 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973), the Attorney General filed a desegregation suit against a school board. On a motion to intervene by black individuals the court stated that the Attorney General is specifically charged with representing the interests of the black students and parents and that that representation was adequate. "Representation is adequate if no collusion is shown between the

representative and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervenor, and if the necessary representative does not fail in the fulfillment of his duty." 466 F.2d at 575.

Under Section 5, the Attorney General is specifically charged with representing the black voters of the litigating or submitting state. Thus, the appellants' interests are adequately represented absent collusion or bad faith by the Attorney General. The appellants cavalierly suggest that their rights have been "bargained away" by agreement between Mississippi and the United States in this case.[3] Jurisdictional Statement at 8. However, in *Donnell* v. *United States*, 682 F.2d 240 (D.C. Cir. 1982), the Court determined that the sole interest of both the Attorney General and black voters in a Section 5 proceeding was in preventing a dilution of black voting strength. The court stated that they would "not lightly infer that the Justice Department has violated this statutory obligation." 682 F.2d at 247. See also, *Morris* v. *Gressette*, 432 U.S. 491 (1977) at n. 23.

The appellants contend that in fact their "interests" differ from the Attorney General's in this case because the Attorney General precleared a plan they dislike. However, in *Board of School Commissioners*, *supra*, the court took a more narrow view of what constitutes differing "interests" under Rule 24.

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[3] This suggestion is ludicrous in light of the long history of vigorous litigation between the State and the United States regarding the apportionment of the Mississippi State Legislature. The plans precleared in 1982 by the Attorney General are substantially similar to those plans approved by the District Court for the District of Columbia in 1979, which judgment was affirmed by this Court. *Mississippi* v. *United States*, 490 F.Supp. 569 (D.D.C. 1979), *aff'd* 444 U.S. 1050 (1980).

> That [intervenors] would have been less prone to agree to the facts and would have taken a different view of the applicable law does not mean that the [defendants] did not adequately represent their interests in the litigation. 466 F.2d at 575.

And in *United States* v. *International Telephone & Telegraph Corp.*, 349 F.Supp. 22 (D. Conn. 1972), an antitrust enforcement action instituted by the United States in which private citizens sought to intervene, the court noted: "[A] mere showing that the Justice Department failed to agree with the movants' version of proper antitrust policy falls wide of proof that the public was not adequately represented." 349 F.Supp. at 27.

The appellants in this case were adequately represented by the Attorney General. The purpose and function of Section 5 was to have the Attorney General assume the burden of litigation in the place of black voters. *Beer* v. *United*, 410 U.S. 425 (1976). Any disagreements the appellants have with the Attorney General's interpretation of the law or with the application of Section 5 to the facts of this case are irrelevant to the question of adequate representation under Rule 24(a)(2).

In sum, the ability of the appellants to protect their rights and interests in a constitutional challenge in Mississippi is not impaired by denial of intervention. Moreover, the interests of the appellants and the Attorney General are identical and the appellants cannot make a showing of collusion or bad faith on the Attorney General's part. Therefore, the appellants were not entitled to intervene as of right in the action below.

As a final comment on intervention as of right, it is interesting to note that shortly after the enactment of the Voting Rights Act, a three-judge court for the District of Columbia found that intervention was not permitted in a

Section 4 declaratory judgment action to reinstitute a test or device. *Apache County* v. *United States*, 256 F.Supp. 903 (D.D.C. 1966). Using the test of Rule 24 prior to its 1966 amendment, the court found that no decree in the suit could have the effect of legally binding or concluding the rights of the movants in any action to enforce their individual rights. 256 F.Supp. at 907. Under the pre-1966 rule a potential litigant had to show that he would be "legally bound" by the decree in the case.

The District of Columbia Courts have not heeded the caution of Judge Levanthal in *Apache County*, but have rather liberally granted permissive intervention. In recent actions for attorneys fees by defendant-intervenors, however, the Court of Appeals has reevaluated and applauded the wisdom of this early decision. In *Donnell* v. *United States*, 682 F.2d 240 (D.D.C. Cir. 1982), the court quoted *Apache County* as follows:

> Congress assigned to the Attorney General the primary role in vindicating the public interest under the Act. We should be reluctant indeed to permit intervention . . . in the absence of a plausible claim that the Attorney General is not adequately performing his statutory function . . . . 682 F.2d at 246, quoting *Apache County*, 256 F.Supp. at 908.

IV. When The Attorney General Acts In His Capacity To Administratively Preclear Voting Legislation Submitted To Him In Conformance With 28 C.F.R. §§ 51.25 *et. seq.*, His No-Objection Letter Renders Moot A Pending Declaratory Judgment Action Regarding The Same Or Superseded Legislation.

The appellants have argued that this Court's opinion in *City of Port Arthur* v. *United States* mandates that once the declaratory judgment action is commenced, the Attorney General cannot grant a preclearance. 103 S.Ct. 530 (1982). The appellants, however, have entirely mis-

read *Port Arthur* and failed to distinguish it from the case at bar.

In *Port Arthur*, the city instituted a Section 5 suit after the Attorney General has interposed an objection to the submission of an at-large electoral plan following an annexation. The complaint was amended and a second plan which contained some single member districts was proposed to the court. The court denied declaratory relief to the city. Thereafter the city and the Attorney General together offered a new electoral plan to the district court. The court held, and this Court affirmed, that it was not required to enter a declaratory judgment based on the parties' joint advocacy of the plan.

In the present case, the legislative reapportionment plans were submitted to the Attorney General in conformance with the Justice Department regulations 28 C.F.R. §§ 51.25 *et seq.* The Attorney General thereafter issued a no-objection letter based on the State's completed submission. The distinction between this situation and *Port Arthur* was pointed out by this Court in the *Port Arthur* opinion. "*Preclearance* by the Attorney General may obviate a court suit, but here the Attorney General was acting in the capacity of a litigant when it joined the City in submitting a plan for the courts' consideration." 103 S.Ct. at 534, n. 5. (emphasis added).

When the Attorney General advised the state that he would interpose no objection to Mississippi's legislation, he was acting within the scope of his statutory function to grant administrative preclearance under Section 5. Once the preclearance was granted, the case pending before the district court was moot.

Insofar as the Mississippi reapportionment plans were conclusively precleared by the Attorney General, any

action by the district court would have amounted to judicial review of the administrative approval. In *Morris* v. *Gressette*, 432 U.S. 491 (1977) this Court specifically held that the Attorney General's Section 5 determinations cannot be questioned in a suit seeking judicial review. 432 U.S. at 507.

As the *Morris* Court explained, administrative preclearance was intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. Congress was concerned during the drafting and consideration of the Voting Rights Act that the time required to pursue a declaratory judgment would unduly delay the implementation of nondiscriminatory laws. In response to this concern, Congress included the alternative of preclearance by the Attorney General. Necessarily, the extraordinary remedy of postponing the implementation of a state's legislation was to cease once the Attorney General declined to object to a complete submission. Judicial review of the Attorney General's Section 5 decisions would defeat Congress' intent in providing the administrative alternative.

CONCLUSION

This appeal should be dismissed for want of jurisdiction. Alternatively, the order of the district court dismissing the action below and denying the appellants' motion to intervene should be affirmed.

Respectfully submitted,

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No. 82-1840

In the Supreme Court of the United States

OCTOBER TERM 1982

HENRY J. KIRKSEY, ET AL., APPELLANTS

v.

STATE OF MISSISSIPPI AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the three-judge district court abused its discretion in denying appellants' application to intervene in this action for a declaratory judgment under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

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In the Supreme Court of the United States

OCTOBER TERM 1982

No. 82-1840

HENRY J. KIRKSEY, ET AL., APPELLANTS

v.

STATE OF MISSISSIPPI AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of this Court's Rules, the United States moves that the judgment of the district court be affirmed.

STATEMENT

1. On February 8, 1982, the Governor of Mississippi signed S.B. 2430, 1982 Miss. Laws ch. 305, and H.B. 315, 1982 Miss. Laws ch. 306, the state's legislative reapportionment plan based on the 1980 Decennial Census (Complaint at 5-6).[1] On July 1, 1982, the State submitted the Acts to the Attorney General for preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c (Complaint at 6). On August 25, 1982, the Assistant Attorney General for the Civil Rights Division wrote to the State requesting additional information to enable him to determine, pursuant to Section 5, whether the redistricting Acts lacked racially discriminatory purpose and effect (J.S. 4).[2]

[1] We are lodging the relevant pleadings with the Clerk of this Court.

[2] See 28 C.F.R. 51.35.

Without furnishing the requested information, the State of Mississippi on September 20, 1982, filed the present suit in the United States District Court for the District of Columbia seeking a declaratory judgment preclearing the legislative reapportionment plan under Section 5. The United States filed an Answer on November 1, 1982, stating that the initial submission had never been completed; as a consequence, the Attorney General lacked knowledge and information sufficient to form a belief with respect to the plaintiff's allegations that the bill lacked discriminatory purpose and would have no discriminatory effect (Answer paras. 11, 13, 18, 21).

After filing this suit, Mississippi furnished the additional information requested by the Attorney General. On November 22, 1982, the Assistant Attorney General for Civil Rights informed Mississippi by letter that no objection to the plan would be interposed.[3] That letter was appended to a joint motion filed on December 2, 1982, by Mississippi and the government to dismiss the preclearance suit.

Meanwhile, on November 18, 1982, appellants, black voters residing in Mississippi, filed a motion for leave to intervene as defendants pursuant to Rule 24, Fed. R. Civ. P., and proffered an Answer in Intervention. In their joint motion to dismiss, the parties opposed the appellants' motion to intervene on the ground that the case was now moot. On January 12, 1983, the district court denied the appellants' motion to intervene, and dismissed the suit (J.S. App. 1a-2a).

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[3]Because not all the time provided by Section 5 for the Attorney General to interpose an objection had run, the letter also stated that the Attorney General reserved the right to object should further information come to his attention during the remainder of the 60-day statutory period. No *such objection was interposed.*

ARGUMENT

1. Appellants contend that their application to intervene in this Section 5 case pursuant to Rule 24, Fed. R. Civ. P., was improperly denied.

Although the cases cited by appellants (J.S. 15-16 n. 8) demonstrate that permissive intervention by third parties in Section 5 preclearance suits has been liberally allowed, denial of permissive intervention is reviewable only for abuse of discretion. *Brotherhood of R.R. Trainmen* v. *B. & O. R.R.*, 331 U.S. 519 (1947); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* para. 24.15, at 24-164 to 24-165 (2d ed. 1982). That no such abuse took place here is so apparent as to render the question presented insubstantial and unworthy of plenary review by this Court.

a. Appellants contend (J.S. 15-20) that they have a right to intervene under Rule 24 because they assert "an interest relating to the property or transaction which is the subject of the action and [they are] so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest" (Fed. R. Civ. P. 24(a)(2)). It is clear from Section 5 of the Voting Rights Act of 1965 and the decisions of this Court that private litigants do not have a legally cognizable "interest" in the substantive outcome of any particular Section 5 submission. While the implementation of the Mississippi reapportionment plans undeniably may affect the voting rights of the black citizens of Mississippi, appellants and other voters may vindicate those rights through litigation under the Constitution or Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

Section 5 of the Voting Rights Act of 1965 provides two methods for preclearance of proposed voting changes by covered jurisdictions: either (l) by administrative action of the Attorney General or (2) by declaratory judgment of the District Court for the District of Columbia in a suit brought by a covered jurisdiction in which the Attorney General is

the statutory defendant. See *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). This Court has inferred a private right of action under Section 5 for the limited purpose of assuring that no person in a covered jurisdiction will be subjected to a voting change that has not been precleared as required by that Section (*Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969)), but no private right of action has been created by Congress or inferred by this Court to challenge a preclearance granted either by the Attorney General or the district court.

On the contrary, in *Morris* v. *Gressette*, 432 U.S. 491 (1977), this Court specifically rejected the contention that private parties have protectable Section 5 "rights" beyond those recognized in *Allen, supra*. In *Morris*, this Court held that private parties could not challenge the Attorney General's decision to preclear a voting change. The Court recognized that Section 5 procedures afford special protections, unavailable in traditional litigation, for minority voting rights by preventing implementation of a voting change until a covered jurisdiction has carried its burden of proving the absence of discriminatory purpose and effect. The Court nevertheless concluded that "[w]here the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation." 432 U.S. at 506-507.

Of course, the views of private parties in the Section 5 preclearance process are helpful. Accordingly, the Attorney General invites the views of affected voters in considering a submission (28 C.F.R. 51.36). Such views will also usually be helpful to the district court if it must decide whether to preclear a reapportionment by a declaratory judgment. But private parties have no more *right* to participate in a

preclearance suit than they do to seek judicial review of administrative preclearance.[4]

b. The district court did not abuse its discretion in denying permissive intervention under Rule 24(b), Fed. R. Civ. P., for the case was moot as between the parties. Appellants argue that by dismissing as moot, the district court deprived them of a case in which to intervene. Where the parties have no "case or controversy," however, it is surely appropriate to refuse to continue the suit merely in order to provide other persons a vehicle for permissive intervention. As the district court recognized in rejecting a substantially identical argument in *City of Dallas* v. *United States,* 482 F. Supp. 183, 186 (D.D.C. 1979):

> Nothing in the Act, however, vests this court with jurisdiction to retain a moot case to accommodate the intervenor's quest for a forum in which to test a voting plan that has already been approved by the Attorney General under § 1973c [Section 5].

2. Because appellants' application to intervene in this case was denied, they never became parties to the action and have no standing to appeal from the judgment. *Brennan* v.

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[4]Appellants' sole authority for their claim that they are entitled to intervene as of right is an unpublished order of March 22, 1982, in *Busbee* v. *Smith,* Civ. No. 82-0665 (D.D.C.) (App. A, *infra*). The reference in that order to Fed. R. Civ. P. 24(a) is evidently a typographical error, because the court relies on the fact that the federal defendants have acquiesced in *permissive* intervention. In contrast, in *Senate of California* v. *Smith,* No. 81-2767 (D.D.C. Apr. 23, 1982), the district court, after extensive analysis, decided that there is no intervention as of right in a Section 5 proceeding. See also *Apache County* v. *United States,* 256 F. Supp. 903, 906-907 (D.D.C. 1966) (no intervention as of right under earlier version of Fed. R. Civ. P. 24(a) in suit under Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b—providing for suspension of literacy tests in certain areas until D.D.C. issues declaratory judgment that test not used discriminatorily—on ground (*inter alia*) that public, not private, right involved).

Silvergate District Lodge No. 50, 503 F.2d 800, 803 (9th Cir. 1974); cf. *Ex parte Cutting*, 94 U.S. 14 (1876). Accordingly, this Court need not consider their contention that the Attorney General does not have the authority to preclear a voting change once an action for a declaratory judgment has been filed in the District Court for the District of Columbia. Moreover, appellants are seeking review of the Attorney General's preclearance of a plan—exactly what *Morris* v. *Gressette, supra,* precludes. But even if appellants' argument were viewed as an attack on the denial of permissive intervention on the ground that the case could not properly be considered moot, the argument is without merit.

Acceptance of appellants' argument would mean that once a covered jurisdiction submits a voting change to the District Court for the District of Columbia for a declaratory judgment, that jurisdiction and the Attorney General are locked into an adversarial contest that must inevitably proceed to judgment on the merits. Such an analysis would preclude the State from voluntarily withdrawing the suit, just as it would preclude the government from confessing judgment. Indeed, it would prevent what in fact happened in *City of Dallas, supra,* where the city decided to abandon its effort to clear its first plan, passed another, and had the second plan cleared administratively. Presented with the agreement of the parties, the district court declared the case moot.

Appellants' insistance on litigation despite the agreement of the parties is not supported by this Court's decisions in *Port Arthur* v. *United States*, No. 81-708 (Dec. 13, 1982) or *Richmond* v. *United States*, 422 U.S. 358 (1975). Those cases do not, as appellants contend (J.S. 8-11), hold that once litigation is underway, agreement between the government and the plaintiff cannot divest the district court of

jurisdiction. In neither case did the Attorney General purport to preclear a plan while litigation was underway. In each case, the government had interposed an objection to the initial plan, and the district court had also denied preclearance; the government simply took a litigative position in each case with respect to relief. In neither case did the government claim that its position rendered the case moot, and in neither did this Court address that issue.

In any event, the facts of the present case are quite different from those in either *Richmond* or *Port Arthur*. Here, while a lawsuit had been filed, issue was never really joined. The government's answer did not deny that the submitted plans should be precleared. In response to the State's motion to expedite, the Attorney General pointed out that the best way to "expedite" would be for the State to complete its submission by coming forward with the necessary additional information. The district court set up the litigating schedule to accommodate completion of the administrative submission, and when that submission was completed, the Attorney General precleared the plan. In this situation, the district court's dismissal of the case was perfectly proper.

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted.

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JUNE 1985

APPENDIX

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

GEORGE D. BUSBEE, et al.,	:	
Plaintiffs	:	
v.	:	Civil Action 82-0665
WILLIAM FRENCH SMITH,	:	
et al.,	:	
Defendants	:	
WILLIAM C. (BILLY)	:	
RANDALL, JR., et al.,	:	
Applicants for Intervention	:	

[Filed Mar. 22, 1982]

ORDER

Upon consideration of the Petition of William C. (Billy) Randall, Jr., *et al.*, to intervene as Defendants in this action, Plaintiffs' opposition thereto, the acquiesence [*sic*] of the Federal defendants to permissive intervention, and the entire record herein, it is by the Court this 22nd day of March, 1982,

ORDERED, that the Petition for Intervention pursuant to Fed. R. Civ. P. 24(a) be and hereby is GRANTED subject to the compliance by Intervenor-Defendants with all outstanding orders of the Court in this action.

s/s AUBREY E. ROBINSON, JR.

Aubrey E. Robinson, Jr.
United States District Judge
For the Court

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Office-Supreme Court, U.S.
FILED
AUG 5 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1840

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HENRY J. KIRKSEY, *et al.*,
Appellants,

v.

STATE OF MISSISSIPPI and UNITED STATES OF AMERICA,
Appellees.

On Appeal from the United States District Court for the District of Columbia

---

BRIEF OPPOSING MOTION TO AFFIRM

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On Appeal from the United States District Court for the District of Columbia

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BRIEF OPPOSING MOTION TO AFFIRM

The Solicitor General's arguments in his Motion to Affirm fail to refute appellants' contentions that the District Court erred in denying appellants' motion for leave to intervene in this action brought pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and that the questions presented in this appeal are substantial. This case presents important issues not only of the Section 5 preclearance authority of the Attorney General "acting in the capacity of a litigant" (*City of Port Arthur* v. *United States*, 103 S.Ct. 530, 534 n. 5 (1982)), but also concerning the principles governing intervention of right under Rule 24(a) of the Federal Rules of Civil

Procedure. This case also is important because of its impact upon the equal voting rights of black voters in Mississippi. What is ultimately at stake in this action is the lawfulness, under Section 5 of the Voting Rights Act, of new statewide legislative reapportionment plans containing 122 House districts and 52 Senate districts which affect the voting rights of 887,206 black citizens of Mississippi, who constitute 35.2 percent of the state's total population.

I. THE DISTRICT COURT'S DENIAL OF THE MOTION TO INTERVENE OF TWENTY-FIVE BLACK VOTERS OF MISSISSIPPI ON BEHALF OF THE CLASS OF ALL BLACK CITIZENS AND BLACK REGISTERED VOTERS OF MISSISSIPPI PRESENTS A SUBSTANTIAL QUESTION

The circumstances of the District Court's denial of intervention in this case represent a manifest injustice. Simultaneously with its denial of appellants' motion to intervene, the District Court also granted the joint motion to dismiss filed by the United States and the State of Mississippi, thereby granting recognition to the Attorney General's unilateral, out-of-court "preclearance" of the House and Senate plans. As a result, appellants, who allege that they represent a defendant class of all black citizens and black registered voters of Mississippi (Answer in Intervention, p. 2), have been denied the opportunity in this case to present their substantial evidence [1] that the House and Senate plans are retrogressive of existing levels of black voting strength and fail to satisfy the requirements of Section 5.

By filing their motion to dismiss, the Justice Department and the State of Mississippi jointly agreed to settle this case and to foreclose any judicial inquiry into

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[1] See affidavit of Robert B. McDuff, filed in the District Court with appellants' Memorandum of Points and Authorities in Opposition to the Motion to Dismiss, attached hereto as an Appendix.

whether or not the state's reapportionment plans meet Section 5 standards. Although normally it may be assumed that the United States adequately represents the public interest in cases of this sort, the United States in its Motion to Affirm filed in this appeal does not contest appellants' contention (J.S., pp. 19-20) that in this case appellants' interests are not represented by the United States, and that appellants' interests are not adequately represented by any of the existing parties. This in itself should be a sufficient ground to reverse the District Court's judgment, to rule that denial of intervention was erroneous, and to remand the case for a full trial on the merits. *See Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 135-36 (1967); *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 506-08 (1941); 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 24.07[4], pp. 24-67 through 24-73 (2d ed. 1982); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909, pp. 519-36, esp. at pp. 530-33 (1972).[2]

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[2] None of the cases denying intervention in Voting Rights Act proceedings, upon which the Government relies, support the denial of intervention here. In *Senate of California* v. *Smith*, Civil No. 81-2767 (D.D.C. April 23, 1982), the District Court did not hold, contrary to the Government's representation (Motion, p. 5 n.4), that there was no intervention of right in Section 5 cases. The court held that the movants, only one of whom lived in a county covered by Section 5, had failed to establish a legally sufficient interest in the action (a finding which is inapplicable here, *infra*, p. 4), and ruled alternatively that the movants had failed to show that their interests were not adequately represented by the Attorney General. Here the Attorney General does not dispute that he does not adequately represent appellants' interests.

Apache County v. *United States*, 256 F. Supp. 903 (D.D.C. 1966), was not a case filed under Section 5 of the Voting Rights Act, but rather was a bailout suit filed under Section 4. Unlike Section 5, there are no decisions holding that Section 4 confers a private right of enforcement on minority voters. *Apache County* also was decided before the 1966 amendments liberalizing the provisions of Rule 24(a)(2), and the prior version required a showing that the

In arguing in support of the judgment below, the United States contends that "[i]t is clear from Section 5 of the Voting Rights Act of 1965 and the decisions of this Court that private litigants do not have a legally cognizable 'interest' in the substantive outcome of any particular Section 5 submission." Motion, p. 3. The Government concedes the obvious, however, when it recognizes that "the implementation of the Mississippi reapportionment plans undeniably may affect the voting rights of the black citizens of Mississippi . . ." *Id.*

The Government's argument that appellants have no legally cognizable interest in this litigation simply cannot be credited; it ignores the entire history of the passage and extension by Congress of the Voting Rights Act. Shortly after the Act was passed, this Court recognized: "The Act was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens," and that it conferred a private right of judicial enforcement upon private litigants. *Allen* v. *State Board of of Elections*, 393 U.S. 544, 556-57 (1969); see also, *Perkins* v. *Matthews*, 400 U.S. 379, 382 (1971). In extending and amending the Act last year, Congress again recognized that the Act was passed to secure the equal voting rights of minority voters.

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movant "is or may be bound by a judgment in the action." See J.S., pp. 18-19.

There is no proof that the recent order of the three-judge District Court in *Busbee* v. *Smith*, Civil No. 82-0665 (D.D.C. March 22, 1982), allowing black voters intervention of right in the Georgia congressional redistricting case was a typographical error (Motion, p. 5 n. 4). Intervenors predicated their motion for leave to intervene almost exclusively on the provisions of Rule 24(a), Memorandum in Support of Petition for Leave to Intervene, *Busbee* v. *Smith*, *supra*, pp. 1-4. The court's acknowledgement that the Attorney General acquiesced in permissive intervention does not necessarily exclude a ruling on movants' motion for intervention of right. If the court order based on Rule 24(a) was a typographical error, as the Government contends, the Attorney General who was a party to that proceeding should have made a motion to correct the error pursuant to Rule 60(a), Fed. R. Civ. P., which he did not do.

> The Voting Rights Act of 1965 was primarily designed to provide swift, administrative relief where there was compelling evidence that, despite a history of litigation, racial discrimination continued to plague the electoral process, *thereby denying minorities the right to exercise effectively their franchise.*

H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 3 (1981) (emphasis added). Thus, it is clear that the United States is wrong to argue that the appellant black voters of Mississippi, whose recorded history of victimization produced the Voting Rights Act and for whose benefit the Act was passed, do not have a substantial legal interest to protect by intervening in this Section 5 action.[3]

The Government's argument that nothing is lost by not allowing these black Mississippi voters intervention in this action because they are free to vindicate their rights through traditional constitutional or statutory litigation in another forum (Motion, p. 3) is inconsistent with the rationale for allowing intervention under Rule 24(a) and should be rejected. The vast majority of cases construing Rule 24(a) hold that simply because proposed intervenors may have another cause of action in another forum is not sufficient to deny intervention of right.[4] Moreover, this is

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[3] The substantial interests of black voters in proper administration by District Courts of the Section 5 preclearance provision was recently recognized by the District Court for the District of Columbia in awarding black Mississippi voters attorneys' fees in a Section 5 case involving Mississippi's congressional districts:

> Intervenors had a substantial interest to protect and were not mere volunteers. That interest was well and fully protected by aggressive participation. Intervenors contributed substantially to the case and are entitled to fees.

Mississippi v. *Smith*, Civil No. 82-0956 (D.D.C. July 8, 1983) (slip op. at 6).

[4] *Smith* v. *Pangilinan*, 651 F.2d 1320, 1325 (9th Cir. 1981); *Newport News Shipbuilding & Drydock Co.* v. *Peninsula Shipbuilders Association*, 646 F.2d 117, 121 (4th Cir. 1981) (possible adverse District Court judgment, even if not entitled to res judicata

one of those instances in which appellants are precluded by the statute from bringing a Section 5 preclearance case themselves in another forum; hence, this is one of those rare cases where appellants have "no remedy to litigate [their] question [of whether these plans meet Section 5 standards], except by intervening." *Washington* v. *United States*, 87 F.2d 421, 434 (9th Cir. 1936).

Further, and more important here, the Justice Department's argument defeats the intent and rationale of Congress in enacting the Section 5 preclearance procedure. Congress enacted this "uncommon exercise of congressional power" (*South Carolina* v. *Katzenbach*, 383 U.S. 301, 334 (1966)) for the very reason that traditional constitutional and statutory voting rights litigation was found to be inadequate to protect minority voters from new forms of voting discrimination.[5]

The very argument made by the United States here was made by the State of Mississippi in resisting any private enforcement of the protections of Section 5, and was de-

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or collateral estoppel effect, created "the kind of 'practical disadvantage' that has been thought sufficient to warrant interventions of right."); *Natural Resources Defense Council, Inc.* v. *United States Nuclear Regulatory Commission*, 578 F.2d 1341, 1345 (10th Cir. 1978) ("Hence, to say that it can be repeatedly litigated is not an answer, for the chance of a contrary result in a case which is substantially similar on its facts to one previously adjudicated seems remote."); *Nuesse* v. *Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967); *Atlantis Development Corp.* v. *United States*, 379 F.2d 818, 829 (5th Cir. 1967).

[5] Congress found that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 328 (footnote omitted). Because of this, and "[a]fter enduring nearly a century of systematic resistance to the Fifteenth Amendment," Congress decided to enact Section 5 "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.*

cisively answered by this Court in *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 556 n. 21:

> Of course the private litigant could always bring suit under the Fifteenth Amendment. But it was the inadequacy of just these suits for securing the right to vote that prompted Congress to pass the Voting Rights Act.

The effect of the Government's argument is to nullify the salutary protections of Section 5 and to remand these black voters of Mississippi to the same type of traditional case-by-case constitutional litigation which proved inadequate to protect their voting rights in the first place.

For these reasons, all the requirements for intervention of right under Rule 24(a) have been met in this case, and the District Court erred in denying appellants' motion for leave to intervene.

II. APPELLANTS HAVE STANDING TO RAISE THE ISSUE OF THE DISTRICT COURT'S DECISION TO DISMISS THIS CASE AS MOOT

The Government's contention that appellants lack standing to contest, in this appeal, the District Court's decision to dismiss this action as moot (Motion, p. 5) is erroneous and should be rejected. The mootness issue is inextricably related to the intervention question. If the Court determines that the District Court erred in denying intervention, then it must necessarily decide whether or not the District Court erred in dismissing this case as moot, since there is no point in remanding to permit appellants to intervene in a moot case. Similarly, if the Court determines that the case is not moot, then it must remand to the District Court to allow intervention, since the District Court's decision to deny intervention was based in substantial part on its decision that the case was moot. Thus, because the District Court's merits ruling and its ruling on the intervention question are so closely interconnected, appellants do have standing to present the

question that the case is not moot because the Attorney General lacks the authority to preclear a voting change once a Section 5 declaratory judgment action has been filed. Cf. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra*, 386 U.S. at 136.[6]

The Solicitor General's argument that "[t]he District Court did not abuse its discretion in denying intervention under Rule 24(b), Fed. R. Civ. P., for the case was moot as between the parties" (Motion, p. 5) illustrates how the questions of intervention and mootness are linked. Because the Attorney General lacked the authority to grant Section 5 preclearance to these reapportionment plans, the case is not moot between the parties, and the District Court's denial of permissive intervention for this reason was erroneous as a matter of law. This case is entirely different from *City of Dallas* v. *United States*, 482 F. Supp. 183 (D.D.C. 1979), upon which the United States relies. In that case the City of Dallas filed a Section 5 declaratory judgment action in the District Court for the District of Columbia seeking preclearance of a city council redistricting plan. After the action was filed, the original plan, which was the subject of the declaratory judgment action, was withdrawn. The city then drew up a new plan, which it submitted for administrative review by the Attorney General and which the Attorney General precleared. Thus, the administrative preclearance in *City of Dallas* involved an entirely different plan, while here the Attorney General purported to preclear *the very same plan* at issue in the District Court litigation.

Appellants do not claim, as the Solicitor General contends, that they have a private right of action to challenge

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[6] *Brennan* v. *Silvergate District Lodge No. 50*, 503 F.2d 800 (9th Cir. 1974), which the Justice Department cites, is not applicable here. The Ninth Circuit held that it did not have to decide whether to reverse the District Court's judgment on the merits because intervention had been properly denied. *Id.* at 803.

a Section 5 preclearance granted by the Attorney General (Motion, p. 4). As we previously showed (J.S., pp. 7-8), appellants are not challenging the merits of the Attorney General's purported Section 5 approval of Mississippi's reapportionment plans. Rather, appellants contend that this Court's rulings in *City of Port Arthur* v. *United States*, 103 S.Ct. 530 (1982), and *City of Richmond* v. *United States*, 422 U.S. 358 (1975), deny the Attorney General the authority, once a Section 5 lawsuit has been filed in District Court, unilaterally as a litigant to "dictate the court's conclusion as to the acceptability of the plan under § 5." 103 U.S. at 534 n. 5.[7]

Contrary to the Government's argument, such a result does not mean that the submitting jurisdiction and the Attorney General must be "locked into an adversarial contest that must inevitably proceed to judgment on the merits" (Motion, p. 6), precluding voluntary dismissal or settlement of the litigation. Section 5 cases have been, and could still be, voluntarily dismissed by the plaintiff,[8]

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[7] The Justice Department appears to have conceded as much in its brief filed in *City of Port Arthur*:

> Section 5 assigns primary responsibility to the United States District Court for the District of Columbia to review voting changes submitted to it for preclearance. While the Attorney General becomes a party-litigant on behalf of the United States in any such suit he is not in such circumstances assuming his special role under Section 5. Thus, the determination of whether a particular plan has been shown to be free of discriminatory purpose and effect rests ultimately with the district court following commencement of a Section 5 suit—whether or not agreement can be obtained from the Attorney General.

Brief for the United States, p. 30, *City of Port Arthur* v. *United States*, *supra*.

[8] For example, in the recent Mississippi congressional redistricting case brought pursuant to Section 5, *Mississippi* v. *Smith*, 541 F. Supp. 1329 (D.D.C. 1982), *stay denied*, 51 U.S.L.W. 3720 (U.S. April 4, 1983), *appeal dism'd*, 51 U.S.L.W. 3789 (U.S. May 2, 1983) (No. 82-540), in which some of the appellants here were intervenors

and settlement could still be reached. All that would be precluded is what is normally precluded in traditional litigation—settlement of the merits without the concurrence of all the parties in interest.

CONCLUSION

For these reasons, and on the basis of the authorities cited, the judgment of the District Court denying intervention and dismissing this case as moot should be reversed.

Respectfully submitted,

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and who were represented by the same attorneys as here, the State of Mississippi was able to take a voluntary dismissal prior to trial. Order of April 11, 1983.

** Appellants gratefully acknowledge the assistance of Mark E. Haddad, a student at the Yale Law School, in writing this brief.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2673

STATE OF MISSISSIPPI,
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant,

and

HENRY J. KIRKSEY, *et al.*,
Applicants for Intervention.

AFFIDAVIT OF ROBERT B. McDUFF

1. My name is Robert B. McDuff. I am an attorney, licensed to practice in the States of Tennessee and Texas, and a member of the bar of United States District Courts for the Western District of Tennessee and the Eastern District of Texas. I am currently working with the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law in a review of the 1982 Mississippi legislative redistricting.

2. I have reviewed the election returns for the 1979 Mississippi legislative election contests. I have learned which candidates and election victors are black from the appendix to the State of Mississippi's Motion to Affirm filed in the United States Supreme Court in the previous combined cases of *Henry* v. *State of Mississippi* (No. 79-528) and *United States* v. *Mississippi* (No. 79-504), 444 U.S. 1050 (1980).

3. I have reviewed the estimates of racial composition according to the 1980 Census for the districts under the

currently existing plan (adopted by the Mississippi legislature in 1978) and also under the 1982 plan as provided to the United States Department of Justice by the State of Mississippi in its Section 5 submission for the 1982 plan.

4. The information described above shows that no black candidate for the Mississippi House of Representatives was elected under the 1978 plan from a district whose black voting age population (VAP) was under 60 percent black, with the exception of District 119 on the Mississippi Gulf Coast. It also demonstrates that no black candidate was elected from any district in the Mississippi Delta with a black VAP under 65.91 percent. Additionally, no black candidate was elected to the Mississippi Senate from a district with a black VAP less than 69 percent, while black candidates for the Mississippi Senate lost in Districts with black VAPs as high as 61.76 percent (District 37) and 59.16 percent (District 13).

5. The information described above shows that, of the 19 House districts in the 1978 plan with a black VAP over 60 percent, black candidates won 14. The number of districts with a black VAP exceeding 60 percent is decreased from 19 in the 1978 plan to 16 in the 1982 plan.

6. The information described above demonstrates that, of the 14 districts in the 1978 plan with black VAPs over 65 percent, 11 were won by black candidates. The number of districts with a black VAP exceeding 65 percent is decreased from 14 in the 1978 plan to 9 in the 1982 plan.

7. The chart attached as Exhibit A, compiled from the information described above, lists each 1978 state House district whose population was over 40 percent black according to 1970 or 1980 Census data, and identifies the

corresponding district in the 1982 plan. (The corresponding relationships between particular districts in the two plans was provided by the State in its Section 5 submission to the Justice Department.) The chart then compares the black percentage of total population and voting age population for the 1978 districts and the 1982 districts, according to 1980 census data. Asterisks indicate those districts currently served by black incumbents.

8. The following summary is derived from the chart in Exhibit A and compares the numbers of districts with designated black population and VAP percentages in the 1978 and 1982 plans for the State House of Representatives.

	State House of Representatives			
	Number of Districts			
	Total Population		VAP	
% Black	1978 Plan	1982 Plan	1978 Plan	1982 Plan
40-50%	15	13	16	12
50-60%	11	8	6	10
60-65%	4	9	5	7
65-70%	7	7	8	2
70-80%	6	6	2	6
80-90%	4	2	3	0
Over 90%	1	1	1	1
Totals				
Over 40%	48	46	41	38
Over 50%	33	33	25	26
Over 60%	22	25	19	16
Over 65%	18	16	14	9
Over 70%	11	9	6	7
Over 80%	5	3	4	1

9. The chart attached as Exhibit B, compiled from the information described above, lists each 1978 State Senate district whose population was over 40 percent black according to 1970 or 1980 census data, and identifies the corresponding district in the 1982 plan. (The corresponding relationships between particular districts in the two

plans was provided by the State in its Section 5 submission to the Justice Department.) The chart then compares the black percentage of total population and voting age population for the 1978 districts and the 1982 districts, according to 1980 census data. Asterisks indicate those districts currently served by black incumbents.

10. The following summary is derived from the chart in Exhibit B and compares the numbers of districts with designated black population and VAP percentages in the 1978 and 1982 plans for the State Senate.

	State Senate			
	Number of Districts			
	Total Population		VAP	
% Black	1978 Plan	1982 Plan	1978 Plan	1982 Plan
40-50%	4	4	6	4
50-60%	7	7	8	6
70-80%	1	0	0	0
Over 80%				
Totals				
Over 40%	18	17	17	14
Over 50%	14	13	11	10
Over 60%	7	6	3	4
Over 65%	2	3	2	2
Over 70%	2	2	1	1
Over 80%	1	0	0	0

11. I have reviewed the maps and statistical information pertinent to an alternative Mississippi legislative redistricting plan designed by State Senator Henry Kirksey, one of the applicants for intervention in this action. The following chart lists the number of districts in Senator Kirksey's plan which fall within the designated categories reflecting black total population percentages.

Kirksey Plan—House of Representatives

Black %	Total Population Number of Districts
40-50%	7
50-60%	6
60-65%	11
65-70%	7
70-80%	6
Over 80%	5
Totals	
Over 40%	42
Over 50%	35
Over 60%	29
Over 65%	18
Over 70%	11
Over 80%	5

Kirksey Plan—Senate

Black %	Total Population Number of Districts
40-50%	5
50-60%	2
60-65%	2
65-70%	6
70-80%	0
80% and over	1
Totals	
Over 40%	16
Over 50%	11
Over 60%	9
Over 65%	7
Over 70%	1
Over 80%	1

12. The information described in #2 above shows that black candidate Charles Evers lost to a white candidate in 1979 in his election bid for the Mississippi State Senate from District 37.

13. The information described in #2 above shows that black candidate W.H. Thomas, Sr. lost to a white candidate in 1979 in his election contest for the Mississippi State Senate from district 32.

14. The information described in #2 and #3 above shows that in the 1979 election, black candidate Clayton Henderson won election to the Mississippi House from District 9 over a white candidate by a margin of only 289 votes. The totals were 2735 (52.79%) for Henderson and 2446 (47.21%) for his white opponent. That district has been reduced from a 66.41 percent black VAP district in 1978 to one which has a 58.22 percent black VAP in 1982.

15. The information described in #2 and #3 above demonstrates that, in the 1979 election, black candidate David Jordan lost the Democratic primary in House District 34 to a white candidate by a 71 vote margin—2263 to 2192. The black VAP in the district was 68.71 percent in 1978, but has been reduced to 63.97 percent in the 1982 plan.

16. The information described in #2 and #3 above shows that black attorney Edward Blackmon lost the 1979 democratic primary to a white candidate in House District 59 by a total of 3199 to 3136—a 63 vote margin. In the general election, the white candidate beat black independent George Nichols, also an attorney, 2971 to 2886—an 85 vote margin. That district had a 65.04 percent black VAP under the 1978 plan, while the corresponding district under the 1982 plan drops to 63.06 percent black VAP.

17. The information described in #2 and #3 shows that in 1979 black candidate David Green won election from House District 98 over a white candidate by 300 votes—3904 (52%) to 3604 (48%). That district was 60.00 percent black VAP under the 1978 plan, but the

black VAP has been reduced to 57.38 percent for the corresponding district in the 1982 plan.

/s/ _____
ROBERT B. MCDUFF

_____
Notary Public

My commission expires _____.

EXHIBIT A TO AFFIDAVIT OF ROBERT B. MCDUFF—
HOUSE OF REPRESENTATIVES

District #	Total 1978-B%	Total 1982-B%	VAP 1978-B%	VAP 1982-B%
5-5	55.92	54.66	50.38	49.12
6-6	33.21	22.78	29.30	20.72
8-8	38.45	38.36	32.90	34.07
*9-9	69.80	63.98	66.41	58.22
10-10	46.94	36.51	42.07	31.27
11-11	50.37	55.17	46.07	50.79
13-13	36.95	42.07	31.89	36.93
21-21	42.44	27.67	39.15	25.15
22-22	35.44	41.30	32.32	36.73
24-24	42.47	46.59	38.91	43.05
25-25	40.34	40.26	35.63	34.58
*26-26	73.82	78.85	69.83	75.43
27-27	51.20	51.41	44.04	44.76
28-29	67.97	71.54	63.06	67.04
29-28	52.59	49.27	45.18	41.91
30-	69.97	—	65.15	—
31-30	60.55	62.91	57.04	59.20
32-31	63.26	63.19	57.72	57.58
33-32	56.89	42.98	51.56	37.95
34-33	70.58	65.91	68.71	63.97
35-34	42.38	52.41	38.21	47.33
36-48	52.48	61.33	47.38	56.99
38-36	50.00	50.00	45.58	45.11
*40-38	67.56	69.42	64.71	64.98
42-40	43.69	22.76	38.30	18.89
43-41	49.46	50.60	42.13	43.30
48-46	39.83	38.59	35.47	33.42
*49-47	69.93	67.29	65.91	62.91
50-	68.43	—	63.79	—

EXHIBIT A TO AFFIDAVIT OF ROBERT B. MCDUFF—
HOUSE OF REPRESENTATIVES—Continued

District #	Total 1978-B%	Total 1982-B%	VAP 1978-B%	VAP 1980-B%
*51-49	80.25	82.06	75.89	78.14
52-50	53.33	52.41	46.72	45.78
53-51	53.87	61.30	49.10	56.80
54-52	39.83	30.89	33.45	24.80
55-53	43.38	43.15	40.23	38.78
56-54	44.89	17.90	40.27	16.09
57-55	35.28	63.69	32.71	58.42
58-56	49.27	48.92	44.79	44.58
59-57	71.28	68.89	65.04	63.06
60-58	46.15	43.10	42.20	39.07
*67-67	86.09	82.30	82.09	77.28
*68-68	88.66	75.70	85.53	70.28
*69-69	87.92	77.69	84.83	74.51
*70-70	94.46	96.72	92.41	96.17
75-63	45.03	71.25	40.44	65.86
77-76	50.96	49.45	47.24	46.00
81-80	47.54	51.50	44.74	46.40
*84-82	71.06	66.47	67.18	62.72
*87-85	78.61	78.61	76.76	75.82
92-91	40.88	41.65	38.24	37.38
94-98	36.41	45.58	33.35	41.85
*95-94	67.85	67.45	61.97	62.99
97-93	39.66	25.37	37.06	23.96
*98-96	60.96	60.36	60.00	57.38
99-97	41.41	40.60	37.66	36.94
100-99	38.18	31.66	34.78	28.49
*104-103	72.99	68.35	68.19	63.49
111-110	62.35	64.12	56.23	57.88
*119-119	58.72	60.67	53.68	54.72

EXHIBIT B TO AFFIDAVIT OF ROBERT B. MCDUFF—SENATE

District # '78-'82	Total 1978-B%	Total 1982-B%	VAP 1978-B%	VAP 1982-B%
1-1	23.59	17.83	20.41	15.61
2-2	47.18	41.87	41.79	37.82
8-8	39.86	36.42	36.32	—
10-10	51.13	44.57	46.42	39.32
11-11	64.98	53.19	59.41	45.34
12-12	60.60	62.08	53.76	54.73
13-13	63.64	67.56	59.16	63.55
14-14	59.13	56.76	55.19	51.10
15-15	48.74	47.00	43.66	41.49
20-20	61.83	58.12	56.49	52.12
21-21	55.77	59.75	51.05	55.19
22-22	50.94	54.27	45.39	48.67
23-23	57.66	60.72	52.62	55.92
24-24	37.39	35.98	34.33	32.92
25-25	39.95	27.29	32.45	—
*27-27	81.99	76.25	77.35	70.98
*28-28	71.85	71.14	69.44	68.55
29-29	28.77	30.85	25.53	27.65
30-19	40.33	36.20	37.39	32.31
32-32	56.89	59.53	53.39	54.69
37-36	64.14	64.82	61.76	61.42
38-37	52.03	52.31	47.42	48.76
39-38	44.63	42.25	41.02	37.80